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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 132

DON WILLIAMS, *Appellant*,

v.

THE CITY OF WICHITA, KANSAS, *Appellee*.

Appeal from the Supreme Court of the State of Kansas

JURISDICTIONAL STATEMENT

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DON WILLIAMS, *Appellant*,

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THE CITY OF WICHITA, KANSAS, *Appellee*.

Appeal from the Supreme Court of the State of Kansas

JURISDICTIONAL STATEMENT

Appellant Don Williams appeals from the judgment of the Supreme Court of the State of Kansas entered on September 17, 1962, holding the 1945 Water Appropriation Act of Kansas valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas, including the dissenting opinion of Justice Schroeder, is reported at 190 Kan. 317 and at 374 P. 2d 578. Copies of these opinions as they appear in the advance sheets of the Kansas Reports are being filed separately and simultaneously herewith. References herein to those opinions are to the advance sheets (i.e., 190 Kan. at 341).

The District Court of Harvey County, Kansas, rendered no opinion.

JURISDICTION

This action was brought in the District Court of Harvey County, Kansas, to enjoin the City of Wichita, Kansas, from drilling and pumping water-supply wells so as to divert subterranean water from under appellant's land. The District Court found that the statute under which the City so acted, the 1945 Water Appropriation Act of Kansas, was invalid under the Constitutions of both Kansas and the United States for the reasons specified by the appellant in his statement regarding the validity of the statute at R. 26-28. The requested injunction was accordingly entered.

On September 17, 1962, that judgment was reversed by a majority of the Supreme Court of the State of Kansas, the court holding that the aforesaid Water Appropriation Act does not violate either the Kansas or the United States Constitution. The court considered and rejected all of appellant's contentions under the Ninth and Fourteenth Amendments and Sec. 10 of Art. 1 of the Constitution of the United States, 190 Kan. at 318, and further noted that "*the constitutionality of the Act is actually the single deci-*

sive issue of the case." 190 Kan. at 319 (emphasis added). Justice Schroeder's dissent was likewise "directed solely to the issue upon which the court decided the case—the constitutionality of the 1945 Water Appropriation Act on the *federal issue* of due process," 190 Kan. at 364. On October 19, 1962, appellant's motion for rehearing was denied. R. 152.

On January 15, 1963, appellant duly filed in the Supreme Court of the State of Kansas a Notice of Appeal to this Court. R. 153. On February 27, 1963, Justice Fatzer of the Kansas Supreme Court signed an order extending the time from March 16, 1963, to and including May 15, 1963, in which to docket the appeal in this Court.

The jurisdiction of this Court to review the judgment below by appeal is conferred by 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Whether the Water Appropriation Act of Kansas, construed and applied so as to deny just compensation to a landowner whose common law right to use underground water to irrigate his crops has been destroyed, is consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Water Appropriation Act of Kansas, construed and applied so as to create a classification for just compensation purposes that discriminates against and denies compensation to a landowner who uses natural rather than artificial irrigation methods, is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATUTE INVOLVED

The statute involved is the 1945 Water Appropriation Act of Kansas, as amended (G.S. 1949, § 82a-701, et seq., as amended). The pertinent portions are set forth in the Appendix hereto, p. 1a, *infra*. The critical portion of the statute is § 82a-701 (d), reading as follows:

> "Vested right" means the right of a person under a common law or statutory claim to continue the use of water having actually been applied to any beneficial use, including domestic use, on or before June 28, 1945, to the extent of the maximum quantity and rate of diversion for the beneficial use made thereof, and shall include the right to take and use water for beneficial purposes where a person is engaged in the construction of works for the actual application of water to a beneficial use on June 28, 1945, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter by such person, his heirs, successors or assigns. Such a right does not include, however, those common law claims under which a person has not applied water to any beneficial use within the periods of time set out in this subsection.

STATEMENT

At issue in this case is the validity, under the Constitution of the United States, of the 1945 Water Appropriation Act of Kansas (G. S. 1949, § 82a-701, et seq., as amended) as interpreted by the court below and as applied to the facts of this case. Such validity, said the court below (190 Kan. at 319), is "the single decisive issue of the case."

This injunctive action began in 1958 with the filing of a petition in the District Court of Harvey County,

Kansas. That petition as amended (R. 6, 17) sought to enjoin the City of Wichita from drilling and pumping ten municipal water-supply wells in the Wichita well-field area in Harvey County, under which are the Equus Beds. Appellant, the owner of land in the vicinity of these wells, alleged that the pumping of the wells would divert subterranean water from under his land and cause irreparable injury for which there was no adequate remedy at law. The appellant further alleged that the Water Appropriation Act of 1945, pursuant to which the city drilled and pumped its wells, was unconstitutional and invalid. R. 8. This allegation was expanded at the time of trial to include specific claims of illegality under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as under Article I, Section 10, and the Ninth Amendment of the Constitution of the United States.[1] R. 26-28.

The following pertinent and essentially uncontested facts were developed at the trial[2] or were referred to by the Supreme Court of the State of Kansas:

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[1] These federal constitutional issues were duly noted in the opinion of the Supreme Court of the State of Kansas, 190 Kan. at 318, and were necessarily passed upon and rejected. Since the appellant's arguments heretofore made as to the invalidity of the Act under Art. I, Sec. 10, and under the Ninth Amendment are encompassed by the arguments under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, only the latter two clauses are specifically advanced in this appeal as grounds for invalidating the statute.

[2] Certain preliminary matters stemming from the District Court's issuance of an *ex parte* restraining order immediately following the filing of the petition were the subject of an appeal to the Supreme Court of the State of Kansas. *Williams* v. *City of Wichita*, 184 Kan. 53, 335 P. 2d 353. These matters are no longer in issue.

(1) Underlying appellant's land in south-central Kansas is a slowly moving body of water, flowing through what is known as the Equus Beds. These beds underlie portions of four Kansas counties, or some 2,340 square miles. The beds themselves are composed of pleistocene deposits—permeable mixtures of sand, gravel, clay and silt formed during the four glacial periods of the last million years.[3]

(2) The Equus Beds, as noted in the majority opinion below (190 Kan. at 320), are located in what is known as the McPherson channel of the ancestral Smoky Hill River. This channel, which has ascertainable lateral limits, was gouged out by water in the early glacial periods and gradually became filled with the present soil mixtures forming the Equus Beds. R. 46-47.

(3) The direction of the normal flow of water in the Equus Beds is generally southeasterly at the rate of two or three feet per day. R. 49. But this flow may be influenced and changed by well pumping operations, which cause the water to flow toward the well borings. In the absence of pumping, however, the spillway or drain of the flowing water is the Little Arkansas River.[4] R. 47.

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[3] The known facts concerning the Equus Beds and the movement of water therein are to be found in Stramel, *Progress Report on the Ground-Water Hydrology of the Equus Beds Area, Kansas* (Bulletin 119, Part 1, State Geological Survey of Kansas, Univ. of Kansas Publications, 1956). This Bulletin (referred to hereinafter as "Bulletin") was before the Supreme Court of the State of Kansas and was introduced into the trial record. R. 36. Copies of this Bulletin are being filed with the Clerk, simultaneously herewith, for the convenience of this Court.

[4] The Supreme Court of the State of Kansas found, 190 Kan. at 325, that the "assertion" that the Equus Beds form an underground stream with known limits, course and direction was "not

(4) The water in the Equus Beds, like the water in any stream or river, is of a transient nature in that it is derived from precipitation falling on the land surface and gradually disappears either through (a) seepage into the Little Arkansas River, (b) evaporation, (c) evapotranspiration, or natural utilization of water by plants from absorption in their root systems, or (d) pumping.[5] The Equus Beds are renewed or recharged by rainfall.

(5) Pumping water from the Equus Beds was first started by the City of Wichita about 1940. There are now a total of 138 wells in this area. Of that number, 55 belong to the City of Wichita, 18 to other municipalities, and 65 to various irrigators. During pumping, these wells tend to draw the flow of water toward them. "The city of Wichita is by far the largest user of water in or near the well field."[6] The current rate of Wichita's total pumping is approximately 30,000,000 gallons per day. R. 43. The court below also found that the ten wells in issue operated by the city "have clearly affected the direction of flow." 190 Kan. at 324.

(6) Appellant is the fee title holder of an 80-acre tract overlying the Equus Beds, the original title

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supported by the evidence." But the only evidence before the court, i.e., the Bulletin referred to in note 3, *supra*, and the testimony of its author, R. 35-50, demonstrates the accuracy of the above description; indeed, the court itself, 190 Kan. at 320-321, gave precisely this description of the underground stream. This confusion in the court's opinion as to the physical characteristics of the Equus Beds, however, is not critical to the constitutional problems presented by this case.

[5] "Ground water in the Equus beds area is a transient resource. The water is derived from precipitation falling on the land surface, and, if the water is not used, it slowly moves out of the area and is replaced by new ground water." Bulletin, p. 23.

[6] Bulletin, p. 9.

having passed from the United States into private ownership in 1876. See 190 Kan. at 352. Since 1939 he has conducted all farming operations on the land. Until the City of Wichita began water pumping operations, this land was naturally subirrigated from the water in the Equus Beds and was not dependent on the vagaries of rainfall for productivity. The proximity of the natural water reservoir to the surface of the land caused appellant's property to be among the most valuable farm acreage in Kansas.

(7) Appellant testified that prior to the fall of 1952 this land was worth $300 per acre. At that time the City of Wichita made application to the chief engineer of the Division of Water Resources, pursuant to the Water Appropriation Act, for an appropriation permit to drill and pump some twenty wells in the area, the one nearest the appellant's land being about 1½ miles distant. Although none of the wells was completed until 1958, and none was actually pumped until early in 1959, appellant testified that the immediate effect of the 1952 application was to reduce the value of his land by $100 per acre. R. 50.

(8) Appellant and his expert witness testified further that the actual drilling of the wells in 1958 caused an additional decrease of $100 per acre in the value of his land. R. 51. Thus the total decrease in the value of the land was shown to be, and was found by the court to be, $200 per acre, quite apart from the decrease in the land's productivity. As a result of various pumpings from the Equus Beds, particularly by the City of Wichita, the water table under the land was materially lowered over the years and the crop

roots were deprived of all their natural water source.[7] Appellant's corn and alfalfa crops failed despite efforts at artificial irrigation. This property, once nationally known for its alfalfa production, is now worthless for that purpose. Even trees on the land have died for lack of water. Only wheat and sorghum can now be grown. R. 52-53.

(9) All twenty of the wells for which application was made by the City of Wichita (ten of which wells are the subject of this litigation) are located on easements acquired by the City of Wichita by contract with other landowners. See 190 Kan. at 349. By each indenture, the city acquired an easement on a five acre tract plus (a) "All of the water bearing sands and water rights . . . in and under said tracts," (b) the right "to use . . . as much of the surface of said tracts of real estate as may be necessary," and (c) the right to go on the surface to "drill for, procure and extract any and all sub-surface water . . . which may flow or percolate thereto from other lands." R. 62-65; see 190 Kan. at 349.

At the conclusion of the trial, the District Court of Harvey County, Kansas, on August 18, 1960, entered a judgment in appellant's favor and permanently

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[7] "When water is pumped from a well, the water level in and around the well is lowered, the greatest amount of lowering being at the pumped well . . . . Continued pumping gradually lowers the water level, and the effects of the pumping can be observed at increasingly greater distances." Bulletin, p. 31. It has been determined that, as a result of Wichita's pumping, in an area of about 6 square miles the water table has declined more than 20 feet, and in an area of about 76 square miles it has declined more than 4 feet. Bulletin, p. 49. "The water table is affected by the city's pumping in an area of about 100 square miles." Bulletin, p. 4.

enjoined the City of Wichita from proceeding further with pumping any water wells in Harvey County so as to divert water from under appellant's land, unless and until it shall have acquired the right to do so by contract or condemnation proceedings. R. 55-59. The court further decreed that "the so-called Water Appropriation Act of Kansas, appearing as G.S. 1949, 82a-701, and said act as amended, is unconstitutional and invalid for the reasons and upon the grounds set forth in the 'Statement of Plaintiff Regarding Validity of Water Act', which reasons and grounds are hereby incorporated herein by reference." R. 57. Thereby incorporated, as grounds for invalidating the statute, were the federal constitutional claims advanced by appellant at the opening of the trial. R. 26-28. The District Court, on the basis of the evidence submitted, also found "Each and all of the issues of fact and law in favor of the plaintiff and against the defendant, the City of Wichita." R. 58.

Upon appeal by the City of Wichita, R. 60-62, the Supreme Court of the State of Kansas reversed the judgment of the District Court and, over the dissent of Justice Schroeder, held the Water Appropriation Act valid under both the federal and state constitutions. In this holding, the court noted that the City of Wichita had abandoned all specifications of error "except those asserting that the district court erred in holding the Act unconstitutional and in granting judgment on the merits in favor of plaintiff." 190 Kan. at 319. Such narrowing of the scope of the appeal, said the majority, "is in keeping with the statement of plaintiff's counsel that the constitutionality of the Act is actually the single decisive issue in the case." 190 Kan. at 319. See also Justice Schroeder's

statement, 190 Kan. at 364, to the effect that the majority had decided the case solely on the issue of the validity of the Act under the federal Due Process Clause.

The majority opinion below is long, confused and internally inconsistent, as the dissenting opinion makes plain. But a fair summary of its basic determinations as to the Water Appropriation Act, from which the federal constitutional claims emerge, may be made as follows:

(a) The "vested rights" recognized by the Act as entitled to compensation do not include those common law rights in the use of water by natural processes as it passes under the land in question. Appellant's rights here were determined to be of that nature and hence not entitled to compensation for their destruction. Contrary to pre-1945 Kansas common law, appellant was said to have no common law or vested interest in preventing others from pumping or diverting the underground water even though the natural subirrigation of appellant's land and crops was completely destroyed thereby.

(b) The "vested rights" recognized by the Act as entitled to compensation relate only to those beneficial uses of underground water in the form of artificial diversion works, such as wells, dams, pipes, irrigation ditches and the like. Appellant's use of the underground water to provide natural irrigation for his crops through root absorption was defined to be a "nonuse" and hence excluded from the statute's definition of "vested rights" entitled to compensation when impaired or destroyed.

The conclusion reached was expressed in the majority opinion as follows (190 Kan. at 341): "The suggestion

that he [appellant] has such rights in ground water underlying his land as must be acquired by eminent domain is untenable."

Thus appellant has fully exhausted the remedies in the state courts, remedies which were thought by the three-judge federal court in *Baumann* v. *Smrha*, 145 F. Supp. 617 (D.C. Kan.), to afford protection to any vested rights appellant might have under the statute so as to warrant abstention by that court. The affirmance of that three-judge determination by this Court, *Baumann* v. *Smrha*, 352 U.S. 863,[8] was premised upon motions to affirm urging that the courts of Kansas were available to afford protective relief for appellant's rights. Now that the Supreme Court of Kansas has ruled that appellant has no rights protected by the Water Appropriation Act, the validity of that Act under the federal Constitution is squarely and inescapably in issue.

THE QUESTIONS ARE SUBSTANTIAL

Critical questions under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment are raised by this appeal. Those questions relate to the power of a state legislature to permit the taking of property rights in the beneficial use of water without requiring the payment of just compensation.[9]

The constitutional answers are not to be found in the unquestioned power of a state to conserve so vital a natural resource as water or in its authority to regulate

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[8] Mr. Justice Reed and Mr. Justice Douglas would have noted probable jurisdiction of the appeal. 352 U.S. 863.

[9] "The suggestion that he has such rights in ground water underlying his land as must be acquired by eminent domain is untendable." 190 Kan. at 341.

the usage of this resource in order to preserve equality in the right of use. Within the bounds of public interest, there is no constitutional reason "why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753.

To deny that proposition is to hold that the Fourteenth Amendment, with its just compensation requirements, is of no avail and has no application where the invasion of private rights is effected by a state legislature in order to achieve some public purpose. This Court has never so held. See *Davidson* v. *New Orleans*, 96 U.S. 97, 102; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 235; *United States* v. *Lynah*, 188 U.S. 445, 470.

I. The Due Process Questions

(A) *The nature of appellant's rights in the use of the underground waters.* Prior to the enactment in 1945 of the Water Appropriation Act of Kansas, appellant unquestionably did make use of the waters in the Equus Beds underlying his land by the natural process of subirrigation—the natural utilization of water by plants from absorption in their root systems. This utilization of the water made appellant's lands among the most productive and valuable in Kansas. Such utilization, moreover, was a well-established property right. Recognition of that right came from both the common law of Kansas and state legislative expression.

In a 1944 decision delineating the nature of such property rights in the very Equus Beds here involved,

the Supreme Court of the State of Kansas held (a) that water rights in Kansas had always been governed by common law principles save where modified by statute, (b) that underground waters, including those in the Equus Beds, are part of the real estate in which they are situated, and (c) that a party having the right of eminent domain may appropriate underground water to his use by condemnation proceedings. *State ex rel. Peterson* v. *Kansas State Board of Agriculture,* 158 Kan. 603, 149 P. 2d 604.[10] Among the earlier Kansas cases cited by the court in the *Peterson* decision were those holding that while the landowner may make reasonable use of the underlying water as he sees fit he may not thereby destroy or diminish the flow of water on or under his neighbor's land, to the injury of his neighbor. *City of Emporia* v. *Soden,* 25 Kan. 588; *Wallace* v. *City of Winfield,* 96 Kan. 35, 149 P. 693.

The Kansas decisions prior to the adoption of the Water Appropriation Act in 1945 thus reflected the general common law rule, as developed in the majority of American jurisdictions, that the surface owner has a property interest in the use of subterranean waters beneath his land, an interest entitling him to legal protection against injuries to, or destruction of, his use-rights due to diversions or depletions of the water-

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[10] Two years after the *Peterson* decision, the Kansas court reiterated that "Under our decisions water in the land is a part of the land itself." *Arensman* v. *Kitch,* 160 Kan. 783, 791, 165 P. 2d 441, 446.

The pertinent portions of the *Peterson* opinion referred to above are set forth in the dissenting opinion of Justice Schroeder in the instant case, 190 Kan. at 342-343.

supply.[11] Such legal protection includes a requirement of compensation for losses suffered in the productivity or value of the land caused by lowering the water level through municipal well-pumping.[12]

The pre-1945 Kansas law in this respect, moreover, made no distinction in the protection afforded as between subterranean streams or mere percolating waters.[13] Such is evident from the representations made to this Court by the State of Kansas on behalf

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[11] The American rule to this effect is a modification of the early English common law rule. See Walsh on Equity § 36, pp. 194-195 (1930); 1 Thompson on Real Property § 75, pp. 84-88 (Perm. ed. 1939); 2 Nichols on Eminent Domain § 5.78, p. 120 (3d ed. 1950); Ziegler, *Water Use Under Common Law Doctrines*, Water Resources and the Law 51, 80-81 (Legislative Research Center, Univ. of Michigan Law School, 1958); Water Resources Law, Vol. 3, pp. 158-162 (Report of the President's Water Resources Policy Commission, 1950). See also the extensive discussion of this problem in *City Mill Co., Ltd.* v. *Honolulu Sewer & Water Commission*, 30 Hawaii 912.

[12] *Forbell* v. *City of New York*, 164 N.Y. 522, 58 N.E. 644; *Schenk* v. *City of Ann Arbor*, 196 Mich. 75, 163 N.W. 109; *Davison* v. *City of Ann Arbor*, 237 Mich. 453, 212 N.W. 81.

[13] Despite the clear expert evidence (see attached Bulletin) that the water in the Equus Beds under appellant's land flows through the known McPherson channel toward a known outlet, the majority opinion below purported to find that these underground waters were percolating in nature (i.e., oozing, seeping or filtering throughout the underground soil without a defined or known channel). But appellant's rights under Kansas common law were essentially the same under either description.

As was stated by the State of Kansas in 1906 in relation to these very Equus Beds, "by whatever definition this real body of water may be known or designated, whether as an underflow appurtenant to the river, sheet-water, ground-water, percolating water, or any old water, the evidence conclusively shows that its presence and relation to the surface soil of the bottom is of vast importance and incalculable benefit to the riparian lands along the Arkansas river in Kansas." Reply Brief of Complainant State of Kansas on Final Hearing, No. 3, Original, Oct. Term, 1906, p. 109.

of itself and of its property-owning citizens in the prolonged Kansas-Colorado litigation.[14] The State there said that under the Kansas common law, *"even though the underflow is to be held as merely percolating water, the right of the Kansas proprietor to such water, undiminished except by reasonable use, is clear and plain"* and that it *"has been thoroughly settled that an adjoining landowner may not drain percolating water from the lands of his neighbors, make merchandise of the water, and sell it, and that equity will enjoin such drainage of adjoining lands."*[15] [Emphasis supplied.]

In further support of the fact that the common law doctrines of riparian rights applied in Kansas to both types of underground waters, the State of Kansas stated:[16]

> "The underground water of the underflow in Kansas, whether it be deemed a part of the surface stream, a subterranean stream, or mere percolating waters, has been shown to be of great value to whole Arkansas valley in Kansas. It belongs to the owner of the soil. He has a vested right in and ownership of it as much as of his land. To cut off the supply that maintains this flow is as serious a damage to him as directly to drain the flow itself . . . It matters not whether one is

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[14] *Kansas* v. *Colorado*, 185 U.S. 125; *Kansas* v. *Colorado*, 206 U.S. 46; *Colorado* v. *Kansas*, 320 U.S. 383.

[15] Brief of Complainant State of Kansas on Final Hearing, No. 7, Original, Oct. Term, 1905, pp. 218-219. In support of these statements, the State of Kansas cited *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 P. 663; *Smith* v. *City of Brooklyn*, 46 N.Y. Supp. 141; and *Forbell* v. *City of New York*, 164 N.Y. 522.

[16] Brief of Complainant State of Kansas on Final Hearing, No. 7, Original, Oct. Term. 1905, p. 220.

> wronged directly or indirectly; whether by deprivation of the flow by adjoining drainage or by destroying the sources of supply at the fountainhead."

Or, as reemphasized again by the State of Kansas:[17]

> ". . . we assert that, even though this underflow be treated, considered or defined as groundwater, or percolating water, the damage to Kansas by its lowering and depletion is no less real, no less capable of ascertainment, no less a wrong for which a remedy may be found, than if it were a true subterranean river . . . the damage resulting from its deprivation and the destruction of its source and cause, remain the same; and, under recent decisions, it matters not what definition is given it, the right of those who own land affected by its presence remains the same, and definitions and abstractions cannot affect the rights of Kansas or the wrongs done by Colorado."[18]

Not only the common law but also the legislature of Kansas had given recognition to appellant's vested property right in the use of the underground waters. In 1917 the legislature declared "underground waters for all purposes to become appurtenant to the lands under which they flow."[19] Such a declaration clearly

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[17] Reply Brief of Complainant State of Kansas, No. 3, Original, Oct. Term, 1906, pp. 110-112.

[18] As a result of these various representations, this Court in *Colorado* v. *Kansas*, 320 U.S. 383; 399, found that the common law prevails in Kansas as to water rights.

[19] L. 1917, Ch. 172, § 6 [d]. This legislation was still in effect at the time of the adoption of the 1945 Water Appropriation Act. See dissenting opinion of Justice Schroeder herein, 190 Kan. at 363-4.

encompassed property rights in the use of waters in or flowing through the Equus Beds.

Thus, as of 1945, appellant had a clear property right in the use—including the use through the natural processes of evapotranspiration or absorption through plant roots—of the water in the underlying Equus Beds. It was a right which was legally protectable, a right which was valuable enough to *require* an award of compensation should it be destroyed or harmed.

(B) *The due process impact of the statute on appellant's vested property right.* As interpreted and applied by the Kansas Supreme Court, the Water Appropriation Act denies to appellant any compensation for the destruction of, or injury to, his vested right to the beneficial use of the water in the underlying Equus Beds. That result was achieved through the construction of the statutory term "vested right" —a term appearing in § 82a-701(d) and referring to those common law or statutory rights as to which compensation must be made in case of destruction or injury through well-pumping.

(1) The term "vested right" was interpreted so as to confine it to the right of any person under a common law or statutory claim to continue the beneficial use of water by artificial aids only so long as the water remains under or in the land in question. 190 Kan. at 330. The court, recognizing only a right of the landowner to capture and control the water currently under his land and refusing to acknowledge that such right, when exercised through the processes of nature, may be impaired by the action of others in diverting the water from the land in question, read out of the

statute all obligation to compensate the landowner for destruction of his natural use-rights occasioned by the diversion of others.[20] But diversion of water which precludes any chance to utilize it while under one's own land has always been considered an injury to the property right in the underground or surface water which necessitates some form of compensation. See, e.g., *Schroeder* v. *City of New York*, 371 U.S. 208, 213-214.[21]

(2) The term "vested right" was interpreted to include only the common law or statutory right to continue a beneficial use on or within three years before June 28, 1945, or within a reasonable time thereafter, *"by means of diversion works then under construction, to the extent of the maximum quantity and rate of diversion for the beneficial use made thereof."* 190 Kan. at 335 [emphasis supplied].

Thereby precluded from compensation under this statute are those persons whose beneficial use of underground water does not involve artificial diversion

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[20] That such compensation was required under the pre-1945 Kansas common law is demonstrated by the State of Kansas in its statement to this Court that while Colorado had a right to pump underground water "it cannot be said [under the authorities cited] that this underflow [in Kansas], its source and supply may be depleted, diminished or destroyed in order to make merchandise of the water in Colorado." Reply Brief of Complainant State of Kansas on Final Hearing, No. 3, Original, Oct. Term 1906, p. 111.

[21] "If his water has been infringed by the pumping operations of the defendants, compensation therefor can be fixed in the reverse condemnation proceedings made available to the parties by the order of reversal." *Hillside Water Co.* v. *City of Los Angeles*, 10 Ca. 2d 677, 688, 76 P. 2d 681, 687. In the instant case, of course, the suit instituted by appellant is in effect a reverse condemnation proceeding by virtue of the public use of the water which subsequently intervened.

through "diversion works", such as wells, pipes, irrigation ditches and the like. A beneficial user like the appellant, who used the underground waters through the natural evapotranspiration process, irrigating crops through their roots, is barred from any form of compensation for the losses sustained by the artificial lowering of the water table.

But the common law in Kansas and elsewhere never recognized any meaningful distinction as between the beneficial use of water by natural processes and the beneficial use of water by artificial diversion works. As was said by the Supreme Court of California in *Hillside Water Co.* v. *City of Los Angeles,* 10 Cal. 2d 677, 686, 76 P. 2d 681, 686, "the use of this underground supply as an undersupport for irrigation or other surface uses would minimize the requirements of surface irrigation and result in benefit to the surface soil and crop conditions" so that "it may not be rightly said that such use is not a beneficial use of the underground waters."[22]

To deny all compensation to this appellant is to allow the destruction of a valuable right heretofore recognized and protected at common law. The Due Process Clause of the Fourteenth Amendment was expressly designed to preclude such a result, whether by statutory design or judicial decision.

This Court has stated, and reiterated, that the Due Process Clause precludes a state legislature from decreeing that a plot of land now owned by A shall

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[22] See also *Forbell* v. *City of New York,* 164 N.Y. 522, 58 N.E. 644, where an injunction was granted and damages assessed for injury to the plaintiff's celery and water cress crops, which had been naturally irrigated by underground water. The water supply had been depleted by the city's well operations.

henceforth be vested in B. *Savings & Loan Assn.* v. *Topeka,* 87 U.S. 655, 663; *Davidson* v. *New Orleans,* 96 U.S. 97, 102; and see *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 120-121. Equally invalid is a statute, like the Water Appropriation Act, that purports to permit B to destroy the property right of A to the beneficial use of water under his land without paying compensation therefor. In both instances, A has been deprived of an important incident of ownership without due process of law.

II. The Equal Protection Questions

The Water Appropriation Act, thus interpreted to permit compensation only to those statutory or common law beneficial users who operate artificial diversion works, raises serious and substantial questions under the Equal Protection Clause of the Fourteenth Amendment.

A state, of course, may establish reasonable classifications in its laws without doing violence to the Equal Protection Clause. But those classifications must be based upon some real and substantial distinctions, bearing a reasonable and just relation to the object of the legislation. *Morey* v. *Doud,* 354 U.S. 457, 465; *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 527.

Plainly, a classification distinguishing between artificial usage and natural usage of underground water raises serious questions of reasonableness in relation to the statutory object of providing just compensation for the loss of water rights. Nothing in the pre-1945 common law of Kansas justified such a distinction in terms of water rights or compensation. And there is a dearth of any precedent in this Court or in any court which, by analogy or otherwise, would

permit this kind of a distinction to be drawn by the Kansas legislature.

In the absence of any asserted basis for this classification, the long and universal recognition of compensable rights in natural usage strongly confirms the arbitrariness and unreasonableness of the statutory discrimination. The utilization of water by the natural processes of absorption through crop roots—technically known as evapotranspiration—is a well-known and widely-used phenomenon; indeed, it is undoubtedly the most economic and waste-free method of water usage imaginable. And on the basis of such usage rests a substantial portion of our farm crop production.

This Court, in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 730, 752-753, recognized the reasonableness of the use of "the natural seasonal overflow of the stream," moistening and enriching low-lying lands "so that forage and pasturage thrive, as otherwise they can not." The construction of a federal dam, which affected the right under California law "to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized," 339 U.S. at 730, was held to give rise to an obligation to compensate for loss of that right. See also *Humphrey Tunnel Co.* v. *Frank*, 46 Colo. 524, 105 P. 1093 (natural use of annual overflow of stream onto adjoining meadowland); *Cascade Town Co.* v. *Empire Water & Power Co.*, 181 Fed. 1011 (D. Colo.) (natural utilization of seepage from stream and natural usage of spray and moisture from waterfall to grow "exceptional vegetation"); *Osterman* v. *Central Nebraska Public Power District*, 131 Neb. 356, 268 N.W. 334 (natural irrigation of crops from underground flow of river).

This reasonable and natural usage of underground water to irrigate crops, of course, accomplishes the same result sought by the construction of wells and ditches—to wit, the watering and irrigating of the soil and crops. As was said in *Thomas* v. *Guiraud,* 6 Colo. 530, 533:[23]

> If a dam or contrivance of any kind will suffice to turn water from the stream and moisten the land sought to be cultivated, it is sufficient, though no ditch is needed or constructed. Or if land be rendered productive by the natural overflow of water thereon, *without the aid of any appliances whatever,* the cultivation of such land by means of the water so naturally moistening the same is a sufficient appropriation of such water, or so much thereof as is reasonably necessary for such use. The true test of appropriation of water is the successful application thereof to the beneficial use designed; and *the method of diverting or carrying the same, or making such application, is immaterial.* [Emphasis supplied.]

In short, no agricultural, hydrological, conservatorial or other public purpose distinction can be drawn between natural and artificial methods of water utilization, let alone a distinction that would justify denial of compensation for the loss of natural use and the award of compensation for the loss of artificial use.

Destruction of either the natural or artificial method of watering crops through the diversion of under-

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[23] See also *Cascade Town Co.* v. *Empire Water & Power Co.,* 181 Fed. 1011, 1018 (D. Colo.): "The complainant is not required to construct ditches or artificial ways through which the water might be taken from the stream, in order that it might appropriate the same. The only indispensable requirements are that the appropriator . . . first, must intend to use the waters for a beneficial use, and second, actually apply them to a beneficial use." That case involved a natural usage of water.

ground water has always been deemed to give rise to the constitutional requirement of just compensation. To create a distinction between the two methods in favor of the artificial technique is to classify out of existence the right to accept and utilize the bounties of nature. It would be a sad commentary on the Equal Protection Clause if it were to be construed to permit a classification whereby a farmer can be denied compensation simply because he sought to use natural fertility methods in the growing of his crops. Fortunately, nothing in this Court's decisions justifies that type of invidious discrimination.

The distinction, in short, is "abhorrent to a sense of justice and violative of the appellant's rights as a co-owner of the waters" beneath his land. See *City Mill Co., Ltd.* v. *Honolulu Sewer & Water Commission*, 30 Hawaii 912, 947.

CONCLUSION

For the foregoing reasons, appellant submits that probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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APPENDIX

The Water Appropriation Act as Amended and Supplemented by the Legislature of 1957

Sec. 82a-701. DEFINITIONS. When used in this act, unless the context indicates otherwise, the following words shall have the following meanings:

(a) "Person" shall mean and include a natural person, a partnership, an organization, a corporation, a municipality and any agency of the state or federal government.

(b) "Chief engineer" means the chief engineer of the division of water resources of the Kansas state board of agriculture.

(c) "Domestic uses" means the use of water by any person or by a family unit or household for household purposes, or for the watering of livestock, poultry, farm and domestic animals used in operating a farm, and for the irrigation of lands not exceeding a total of one acre in area for the growing of gardens, orchards and lawns.

(d) "Vested right" means the right of a person under a common law or statutory claim to continue the use of water having actually been applied to any beneficial use, including domestic use, on or before June 28, 1945, to the extent of the maximum quantity and rate of diversion for the beneficial use made thereof, and shall include the right to take and use water for beneficial purposes where a person is engaged in the construction of works for the actual application of water to a beneficial use on June 28, 1945, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter by such person, his heirs, successors or assigns. Such a right does not include, however, those common law claims under which a person has not applied water to any beneficial use within the periods of time set out in this subsection.

(e) "Appropriator" means and includes a person who has an appropriation right that has been perfected in conformity with article 7 of chapter 82a of the General Statutes of 1949 and acts amendatory thereof and supplemental thereto.

(f) "Appropriation right" is a right, acquired under the provisions of article 7 of chapter 82a of the General Statutes of 1949 and acts amendatory thereof and supplemental thereto, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriation rights of later date.

(g) "Water right" means any vested right or appropriation right under which a person may lawfully divert and use water. It is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance.

Sec. 82a-702. *Dedication of use of water.* All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.

Sec. 82a-703. *Water may be appropriated subject to vested rights.* Subject to vested rights, all waters within the state may be appropriated for beneficial use as herein provided. Nothing in this act contained shall impair the vested right of any person except for nonuse.

Sec. 82a-704. *Order determining vested rights other than domestic as of or before June 28, 1945; effect; notice;*

appeal. The chief engineer or his authorized representatives shall proceed with the necessary steps to gather data and other information as may be essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic. Such observations and measurements shall be reduced to writing and made a matter of record in his office.

The chief engineer shall then make an order determining the rights of all persons making beneficial use of water for all purposes other than domestic on or before June 28, 1945, and the then extent of their uses and shall notify all such water users as to the contents of such order. Service of such notice shall be deemed complete upon depositing such notice in the post office as registered or certified mail addressed to such water user at his last known post-office address. Any such water user who deems himself aggrieved by the order of determination with respect to his water use may appeal to the district court in the manner prescribed by section 24 hereof (82a-724). The order of determination of the chief engineer shall be in full force and effect from the date of its entry in the records of his office unless and until its operation shall be stayed by an appeal therefrom by such user in accordance with the provisions of section 24 hereof (82a-724): PROVIDED, That no such determination shall be deemed an adjudication of the relation between any vested right holders with respect to the operation or exercise of their vested rights.

Sec. 82a-705. *Acquisition of appropriation right to use water other than domestic; approval.* No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer, and no water rights of any kind may be acquired hereafter solely by adverse use, adverse possession, or by estoppel.

Sec. 82a-705a. *Domestic use after June 28, 1945; information to chief engineer.* The use of water for domestic purposes instituted subsequently to June 28, 1945, to the extent that it is beneficial, shall constitute an appropriation right. The chief engineer, however, may require any person using water for any purpose to furnish information with regard to such use thereof.

Sec. 82a-706. *Duties of chief engineer as beneficial use and rights of priority of appropriation.* The chief engineer shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.

Sec. 82a-706a. *Rules, regulations and standards.* The chief engineer, subject to the approval of the state board of agriculture, shall adopt, amend, promulgate, and enforce such reasonable rules, regulations, and standards as he shall deem necessary for the discharge of his duties and for the achievement of the purposes of this act pertaining to the control, conservation, regulation, allotment, and distribution of the water resources of the state.

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Sec. 82a-707. *Principles governing appropriations; priorities.* (a) Surface or ground waters of the state may be appropriated as herein provided. Such appropriation shall not constitute ownership of such water, and appropriation rights shall remain subject to the principle of beneficial use. (b) Where uses of water for different purposes conflict such uses shall conform to the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to

satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of his use of the water either temporarily or permanently as long as he is making proper use of it under the terms and conditions of his water right and the laws of this state, other than through condemnation. (c) As between persons with appropriation rights, the first in time is the first in right. The priority of the appropriation right to use water for any beneficial purpose except domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer. The priority of the appropriation right to use water for domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer or from the time the user makes actual use of water for domestic purposes, whichever is earlier. (d) Appropriation rights in excess of the reasonable needs of the appropriators shall not be allowed.

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Sec. 82a-708a. *Applications for permits to appropriate water regardless of use by another; fee.* Any person may apply for a permit to appropriate water to a beneficial use, notwithstanding that the application pertains to the use of water by another, or upon or in connection with the lands of another: PROVIDED, Any rights to the beneficial use of water perfected under such applications shall attach to the lands on or in connection with which the water is used and shall remain subject to the control of the owners of the lands as in other cases provided by law. Each application for a permit to appropriate water, except applications for permits for domestic use, shall be accompanied by an application fee of ten dollars ($10.00). All fees collected by the chief engineer pursuant to the provisions of this section shall be paid into the state treasury, at least monthly, and the state treasurer shall credit the same to the general fund of the state.

Sec. 82a-708b. *Same; applications to change place of use; appeal from decision of chief engineer.* Any owner of a water right may change the place of use, the point of diversion, or the use made of the water, without losing his priority of right, provided he shall (1) apply in writing to the chief engineer for approval of any proposed change; (2) demonstrate to the chief engineer that any proposed change is reasonable and will not impair existing rights; (3) demonstrate to the chief engineer that any proposed change relates to the same local source of supply as that to which the water right relates; and (4) receive the approval of the chief engineer with respect to any proposed change. The chief engineer shall approve or reject the application for change in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water. If the chief engineer disapproves the application for change, the rights, priorities and duties of the applicant shall remain unchanged. Any person considering himself aggrieved by an order or decision by the chief engineer relating to his application for change may appeal to the district court in the manner prescribed by section 24 hereof (82a-724).

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Sec. 82a-709. *Application for permits; contents; time of filing.* No person may acquire an appropriation right to the use of waters of the state for other than domestic purposes without making an application to the chief engineer for a permit to make such appropriation. However, any person using water for domestic purposes subsequent to June 28, 1945, and any person intending to use water hereafter for domestic purposes may make application to the chief engineer for a permit the same as any other person. The application shall set forth (a) the name and post-office address of the applicant; (b) the source from which said appropriation shall be made; (c) the maximum rate at which water is to be diverted or used and the total annual quantity of water

sought; (d) the location of the works or proposed works for the diversion and use of the water; (e) the estimated time for the completion of any proposed works; (f) the time of the first actual application of the water to the beneficial use involved, if there was such, and the estimated time for the first actual application of the water for the beneficial use proposed; (g) if for irrigation use, a description of the land to be irrigated by designating the number of irrigable acres in each forty (40) acre tract or fractional portion thereof; (h) if for municipal water supply, it shall give the present population to be served and estimated future requirements of the city; (i) any additional factors which may be required by the chief engineer.

Such application may be filed before or after the commencement of any work in connection with the construction, enlargement or extension of any works for the diversion, storage, and use of water.

Sec. 82a-710. *Same; return for correction or completion; maps, plats, plans, and drawings; default in refiling.* Upon receipt of the application it shall be the duty of the chief engineer to endorse thereon the date of its receipt and assign a number to the same. If upon examination the application is found to be defective, inadequate or insufficient to enable such official to determine the nature and amount of the proposed appropriation, it shall be returned for correction or completion or for other required information. No application shall lose its priority of filing on account of such defects, provided acceptable data, proofs, maps, plats, plans and drawings are filed in the office of the chief engineer within thirty days following the date of the posting of the return of such application or such further time not exceeding one year as may be given by the chief engineer.

All maps, plats, plans and drawings shall conform to prescribed uniform standard as to materials, size, coloring and scale, and shall show: (a) The source from which the

proposed appropriation is to be taken, (b) all proposed dams, dikes, reservoirs, canals, pipe lines, power houses and other structures for the purpose of storing, conveying or using water for the purpose approved and their positions or courses in connection with the boundary lines and corners of the lands which they occupy. Land listed for irrigation shall be shown in government subdivisions or fractions thereof. Default in the refiling of any application within the time limit specified shall constitute a forfeiture of priority date and the dismissal of the application.

Sec. 82a-711. *Same; duties of chief engineer as to applications.* If a proposed use neither will impair a use under an existing water right nor prejudicially and unreasonably affect the public interest, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purpose, within reasonable limitations. Otherwise the chief engineer shall make an order rejecting such application or requiring its modification to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water. In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration the area, safe yield and recharge rate of the appropriate water supply, the priority of existing claims of all persons to use the water of the appropriate water supply, the amount of each such claim to use water from the appropriate water supply, and all other matters pertaining to such question. With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit. Any person considering himself aggrieved by any order or decision by the chief engineer relating to

that person's application for a permit to appropriate water may appeal to the district court in the manner prescribed by section 24 hereof (82a-724).

Sec. 82a-711a. *Same; express conditions of appropriations.* It shall be an express condition of each appropriation of surface or ground water that the right of the appropriator shall relate to a specific quantity of water and that such right must allow for a reasonable raising or lowering of the static water level and for the reasonable increase or decrease of the streamflow at the appropriator's point of diverson: PROVIDED, That in determining such reasonable raising or lowering of the static water level in a particular area, the chief engineer shall consider the economics of diverting or pumping water for the water uses involved; and nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing water rights can be satisfied under such express conditions.

Sec. 82a-712. *Same; notice of approval or disapproval of application; approval constitutes permit.* The chief engineer shall notify the applicant of the approval or disapproval of the application. Upon approving the application the chief engineer shall authorize the applicant to proceed with the construction of the proposed diversion works and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect his proposed appropriation. The chief engineer may approve an application for a smaller amount of water than requested and he may approve an application upon such terms, conditions, and limitations as he shall deem necessary for the protection of the public interest. The approval of the application by the chief engineer, subject to the terms and conditions

thereof, upon issuance, constitutes a permit to proceed with construction of diversion or other authorized works and with the diversion and use of water in accordance with the terms and conditions of his permit and no common-law claimant without a vested right, or other person without a vested right, a prior appropriation right, or an earlier permit shall prevent, restrain, or enjoin an applicant from proceeding in accordance with the terms and conditions of his permit or from diminishing the water supply.

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Sec. 82a-715. *Same; validation of certain applications.* All applications for the appropriation of water to beneficial use as filed with the chief engineer, subsequent to May 5, 1941, and all processing, proceedings and certificates pertaining thereto are validated to same extent as if filed after the effective date of this act, but with priorities as of the dates of filing of applications. All subsequent processing of such applications as are still pending and undetermined shall be further considered and processed as provided in this act.

Sec. 82a-716. *Common law claimants; action for compensation; injunctions.* If any appropriation, or the construction and operation of authorized diversion works results in an injury to any common-law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken. Any person with a valid water right or permit to divert and use water may restrain or enjoin in any court of competent jurisdiction a subsequent diversion by a common-law claimant without vested rights without first condemning those common-law rights. An appropriator shall have the right to injunctive relief to protect his prior right of beneficial use as against use by an appropriator with a later priority of right.

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Sec. 82a-717a. *Diversions by common law claimants and others; injunctions.* No common-law claimant without a vested right, or other person without a vested right, a prior appropriation right, or an earlier permit shall divert or threaten to divert water if such diversion or threatened diversion impairs or would impair any vested right, appropriation right, or right under a permit to appropriate water. But any common-law claimant with a vested right, or other person with a vested right, a prior appropriation right, or an earlier permit may divert water in accordance with any such right or permit although such diversion or use thereunder conflicts with the diversion, use, proposed diversion, or proposed use made or proposed by a common-law claimant who does not have a vested right, or other person who does not have a vested right, a prior appropriation right, or an earlier permit. Moreover, any common-law claimant with a vested right, or other person with a vested right, a prior appropriation right, or an earlier permit may restrain or enjoin in any court of competent jurisdiction any diversion or proposed diversion that impairs or would impair such right in the event that any such diversion or proposed diversion is made or is threatened to be made by any common-law claimant, or other person who does not have a vested right, a prior appropriation right, or an earlier permit.

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Sec. 82a-721. *Construction of act.* This act shall be construed liberally to effectuate the purposes hereof, and the enumeration of specific powers in this act shall not operate to restrict the meaning of any general grant of power contained in this act or to exclude other powers comprehended in such general grant.

Sec. 82a-721a. *Construction of act; damages to land.* Nothing in this act* shall be construed as limiting any right

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* The 1957 Act.

of an owner of an estate or interest in or concerning land to recover damage for any injury done to his land or to any water rights appurtenant thereto.

Sec. 82a-722. *Invalidity of part.* If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered, and it shall be presumed that the legislature would have enacted this law with the section, subsection or clause held to be invalid, omitted.

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NOTE: All section numbers refer to sections of General Statutes of Kansas, 1949, where same are unchanged or have been amended, and to section numbers to be assigned in 1957 Supp., where sections are supplimental to the 1945 Act.